



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs P Haynes

**Respondent:** C&J Clark International Ltd

**Heard at:** Bristol **On:** 26 January 2018

**Before:** Employment Judge Oliver

**Representation**

**Claimant:** Mr D Curwen, counsel

**Respondent:** Mr J Bryan, counsel

**JUDGMENT** having been sent to the parties and written reasons having been requested at the hearing in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. This Preliminary Hearing was listed to deal with the following issues in relation to the claimant's claim for unfair dismissal:
  - a. Was the claim for unfair dismissal submitted within time?
  - b. If not, was it reasonably practicable to have submitted the claim within time?
  - c. If not, was it submitted within a reasonable period?

### Evidence

2. There was a joint bundle of documents, which I read and have taken into account. I read witness statements and heard witness evidence from the claimant, and from Julie Benjamin of the respondent.

### Facts

3. I find the following facts. I have taken account of all the evidence and submissions and I find the facts that are relevant to the issues.

4. The claimant resigned from her employment by email on 15 February 2017 giving three months' notice under her contract of employment. The contract provided that the respondent could make a payment in lieu of notice. The claimant was requested to remain at work during her notice period. The respondent sent a letter on 20 February confirming that the end of the claimant's notice period would be 15 May 2017.
5. There was then some restructuring at the respondent. On 27 April 2017 the claimant had two meetings with the respondent. The first was with Rosie McKissick, and they discussed a proposal that the claimant would not work out the rest of her notice period. The second meeting was with both Ms McKissick and with Ms Benjamin. This is the key meeting in relation to the facts about the end of the claimant's employment.
6. The claimant says she was told at this meeting that she could leave early, meaning that day, and she would be paid up to 15 May 2017. She was not told that this was a garden leave period. Ms Benjamin says she told the claimant that her employment was brought to an end immediately, 27 April would be the last day of employment, and they would pay in lieu of the balance of the notice period.
7. In evidence Ms Benjamin confirmed that she could not recall verbatim all of the conversation, but she did say that she recalled being explicit about 27 April being the end of employment and the fact that there would be a payment in lieu for the remainder of the notice period.
8. The claimant's evidence is that she recalled it was agreed that she would leave on 27 April. She did not recall exactly what she was told about how it would all work, and she said there were nuances that may not have been picked up on. She did not recall being told about the payment in lieu of notice, but she was not definite that that wasn't said to her.
9. The claimant returned company property and left work later that day. There was no letter sent confirming the content of the meetings or the ending of employment, and no notes were taken of the meetings. The claimant was sent a P45 with a leaving date of 27 April 2017, and the claimant filed this without looking at the particular date.
10. The claimant queried her final pay in May 2017. Her final payslip shows an in lieu of notice payment, which is in contrast to previous payslips which showed basic pay. On 30 May she received a reply from Nicola Swales at the respondent which refers to her leave date being 27 April, and says that no salary payments were made as there was a payment in lieu of notice.
11. The claimant sought employment advice from a friend in March 2017. On the basis that constructive dismissal was inherently risky and she would have to pay up to £1,200 in Tribunal fees, she decided not to bring a claim at that point. The claimant was not eligible for remission but she is the main breadwinner in her family. She has two children, including one at private school, and her evidence was that she could afford to risk that sum of money in her circumstances at the time.

12. The claimant heard about the Supreme Court decision on Tribunal fees shortly after this decision was given, she thinks the day after in the press or the papers - which would be 27 July 2017. The claimant spoke to a legal adviser in early August. They were instructed to draft and issue an Employment Tribunal claim. ACAS was contacted on 14 August and the ACAS certificate was obtained the same day. The claimant does not know why this was not done any earlier. Her claim to the Tribunal was actually submitted on 13 September 2017.

### Applicable law

13. Where an employee is under a period of notice, the employer can bring employment to the end earlier by dismissing that employee. It is necessary for the employer's intention to bring employment to an immediate end to be unambiguous (***Stapp v The Shaftesbury Society*** [1082] IRLR 326). I was also referred by Mr Bryan to ***Delaney v Staples*** [1992] ICR 483, where the House of Lords confirmed various issues in relation to notice and payments in lieu of notice - including confirming that an employer can dismiss an employee immediately with a payment in lieu of notice under their contract.
14. Various authorities were cited to me by Mr Curwen on behalf of the claimant, including ***Adams v GKM Sankey Ltd*** [1980] IRLR 416, ***Chapman v Letheby & Christopher Ltd*** [1981] IRLR 440, and ***Lees v Arthur Greaves Ltd*** [1974] ICR 501. The representatives were essentially in agreement on these authorities. There needs to be an intention by the employer to bring an employment contract to an immediate end, that intention must be unambiguous, and any ambiguity is to be construed against the person relying on the relevant words.
15. Under section 111(2) of the Employment Rights Act 1996 ("ERA"), a claim for unfair dismissal must be presented within a period of three months starting with the effective date of termination. Time can be extended where the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period (section 111(2)(b) ERA), in which case the claim must have been presented within such further period as the Tribunal considers reasonable. The three-month time limit is automatically extended by Acas early conciliation, but only where Acas has been contacted before the original time limit has expired (section 207B ERA).
16. Whether it is reasonably practicable to submit a claim within time is an essentially question of whether it was "reasonably feasible" (***Palmer v Saunders and Southend-on-Sea Borough Council*** [1984] IRLR 119). Where a skilled adviser has been at fault, this does not prevent it from being reasonably practicable for the claim to have been submitted within time. This is clearly established by various authorities, including in particular ***Dedman v British Building and Engineering Appliances Ltd*** [1973] IRLR 379.
17. In relation to whether a claim has been submitted within a reasonable period after the relevant time limit expired, I was referred by Mr Bryan to the decision of the Employment Appeal Tribunal in ***Lezo v OCS Group UK Ltd*** (UKEAT/0104/10). This held that once an adviser had been instructed they

should have been aware of the effective date of termination and the time limit having expired, and on that basis a further delay of nine days was upheld as not being a reasonable period. This was a case where no explanation had been given for the additional delay.

18. In *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51, the Supreme Court declared that *The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013* was unlawful and must be quashed immediately, because it effectively prevented access to justice. A major part of this decision was based on the fact that fees were unaffordable. The Supreme Court held that the fee system could not be regarded as affordable where households on low to middle incomes could only afford fees by sacrificing the ordinary and reasonable expenditure required to maintain an acceptable standard of living. This decision was given on 26 July 2017. The government immediately stopped requiring fees for Employment Tribunal claims, and all fees previously paid are being refunded.

## Conclusions

19. The first issue is essentially a question of fact. In deciding whether the claim was submitted out of time, it is necessary to determine the effective date of termination. Was this 15 May 2017, as initially agreed with the claimant? Or did the respondent unambiguously terminate the claimant's employment with immediate effect at the second meeting on 27 April 2017?
20. I have considered this very carefully based on the evidence I have heard. Having done so, I accept Ms Benjamin's evidence on this point, namely that she was explicit about 27 April being the end of the claimant's employment and not simply the end of the claimant's presence in the office. I also accept that she said there would be a payment in lieu of notice for the remainder of the notice period. The claimant did not recall all of the exact words said to her, although she was clear that she was told to leave that day. The claimant very honestly said that she may not have understood at the time all the nuances of the words that were being used.
21. It is regrettable that there were no notes of this meeting, and also no confirmation in writing of the leaving date having been changed, in circumstances where there was a dismissal of the claimant which brought her employment to an immediate end. I find this surprising, and hope that this would not happen again with this employer in the same situation. However, I do find on the evidence that the claimant was unambiguously told that the 27 April was her last day of employment and she would be paid in lieu for the remainder of her notice period. The respondent intended to dismiss that claimant on that date and had the right under the contract of employment to make a payment in lieu of notice. I find that this did operate as a summary dismissal on that date with a payment in lieu of notice as permitted under the contract.
22. I have taken various other matters into account. These are not determinative, but they do provide corroborative evidence in support of my finding that there was an unambiguous immediate dismissal on 27 April. In particular, there was no garden leave discussion, all company property was

returned that day, the same leaving date was given on the P45, and final pay was treated as a payment in lieu of notice rather than salary. There was also the reference in the respondent's email of 30 May to the leaving date being 27 April, and that there had been a payment in lieu of notice instead of a salary payment.

23. I therefore find that the effective date of termination was 27 April 2017. The claim was presented on 13 September 2017. This means that the claim was presented outside the usual three-month time limit. Acas was contacted about early conciliation on 14 August 2017. As this was also outside the usual three-month time limit, there is no automatic extension of time due to the early conciliation process.
24. The next question is whether it was reasonably practicable for the claimant to present her claim within time?
25. I have looked first at the effect of Tribunal fees. I do accept the claimant's evidence of her reasons as to why she did not want to take the risk of paying £1,200 in fees, in light of her financial circumstances as the main breadwinner for her family. I also accept her argument that it is not simply the £250 issue fee that was the problem, and she needed to be prepared to pay the full amount if she wanted a Tribunal hearing.
26. It may have been possible in theory for the claimant to find money for the fees. However, I have been mindful of what the Supreme Court said in the *Unison* case. The question of whether the relevant Fees Order effectively prevented access to justice was to be decided according to the likely impact of those fees on behaviour in the real world, which meant looking at whether fees could reasonably be afforded rather than whether fees were affordable in a theoretical sense. I have therefore considered the reality of the situation of the claimant rather than the theoretical possibility that the claimant could manage to pay fees by giving up other things. I find that paying the Tribunal fees was not reasonably affordable for the claimant in light of her financial circumstances at the time, in circumstances where the fees system was subsequently found to be unlawful. I also note that the claimant was not cross-examined on this point during the hearing, and the respondent did not adduce any evidence that the claimant was able to reasonably afford the fees.
27. Taking the above matters into account, I do find it was not reasonably practicable for the claimant to submit her claim within time because of the impediment of Tribunal fees, which have since been found to be unlawful under both domestic and European Union law.
28. The respondent put forward an argument that the *Unison* decision was published on 26 July 2017, the last day of the limitation period, meaning that the claim could have been submitted within time. I do, however, accept the claimant's evidence that she was not aware of this decision until at least the next day. I find that it was reasonable for the claimant to be unaware of the change in the law until it had been fully reported the following day, by which time the claim was already out of time.

29. The respondent also put forward an argument based on the case of **Biggs v Somerset County Council** [1996] IRLR 203, a Court of Appeal authority. In this case, the appellant had tried to bring a claim for unfair dismissal out of time following the decision of the House of Lords in **Equal Opportunities Commission v Secretary of State for Employment**, which found that the disqualification of employees who worked for fewer than 16 hours a week from claiming redundancy pay and compensation for unfair dismissal was contrary to European Community law. The Court of Appeal found that the appellant had made a mistake of law rather than fact, and it would be contrary to the principle of legal certainty to allow limitation periods to be circumvented because the existing law had not yet been fully explained or had not been fully understood.
30. The respondent submitted that the claimant could have presented her claim within time without paying the Tribunal fees, and then argued that the relevant fees order was unlawful. The fees regime had always been unlawful, as shown by the Supreme Court's decision that the fees regime was unlawful from the beginning. The respondent argues that it was, therefore, reasonably practicable for the claimant to have submitted her claim within time. I find this an interesting argument. I am not necessarily persuaded that this situation is on all fours with the **Biggs** case, partly because this authority was concerned with specific provisions of directly effective European Community law. It is not necessary for me to make a final determination on this point in this particular case, due to my findings on the next question which determine the outcome of these proceedings.
31. Even if it was not reasonably practicable for the claimant to present her claim within time, it is still necessary for her to have presented it within a reasonable period. I find that the claim was not presented within a reasonable period after the claimant became aware of the **Unison** decision on Tribunal fees.
32. The claimant became aware by the end of July 2017 that fees no longer applied in the Employment Tribunal. She sought legal advice in early August. However, Acas was not contacted until 14 August 2017. No claim was submitted by her legal adviser until 13 September 2017, even though the Acas certificate was provided on the same day as Acas was first contacted. There was a gap of one month between these two events. The claimant was not able to explain any reasons for this further delay, apart from the fact that they were working to the later termination date of 15 May. I have found that this was not the correct effective date of termination.
33. I have taken account of the decision of the Employment Tribunal in **Lezo v OCS Group UK Ltd**, which confirms that the authorities on reasonable practicability and the fault of advisers also apply in deciding whether there has been submission of a claim within a further reasonable period. The claimant did instruct professional advisers in early August and no claim was submitted until 13 September. This is despite the fact that the Acas early conciliation certificate was obtained on 14 August, so the claim could then have been submitted immediately. Taking into account the fact that professional advisers should have ascertained the correct effective date of termination, and the claimant's inability to explain the reasons for the delay, I find that the claim was not submitted within a reasonable period.

34. I therefore find that the claimant's claim was submitted out of time and should be dismissed.

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Employment Judge Oliver

28 February 2018  
Date

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE